No. 04-916

IN THE

Supreme Court of the United States

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY,

Petitioner,

v.

UNDERWRITERS AT LLOYD'S AND COMPANIES COLLECTIVE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Connecticut Supreme Court erred in holding, consistent with every other court that has considered the issue, that the doctrine of *functus officio* permits a remand of an arbitration award to the arbitration panel which rendered it, when the award is incomplete or unclear and, further, that the arbitration award in this case was incomplete and, therefore, susceptible to remand.

CORPORATE DISCLOSURE STATEMENT

Respondent Underwriters at Lloyd's and Companies Collective have no corporate parents, nor is 10% or more of their stock owned by a public company.

Respondent National Union Fire Insurance Company is a wholly-owned subsidiary of American International Group.

Respondent International Fire Insurance Company has no corporate parent, nor is 10% or more of its stock owned by a public company.

Respondent Aetna Casualty & Surety Company n/k/a Travelers Casualty Insurance Company of America has no corporate parent. The St. Paul Travelers Companies owns 10% or more of its stock.

Respondent Home Insurance Company has no corporate parent, nor is 10% or more of its stock owned by a public company.

Respondent Zurich Insurance Company is a wholly-owned subsidiary of Zurich Financial Service.

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STATEMENT OF THE CASE

The arbitration at issue arose out of a dispute as to the allocation of insurance coverage implicated by an August 1993 explosion at an Arkansas power generating plant. *Hartford Steam Boiler Insp. and Ins. Co. v. Underwriters at Lloyd's and Cos. Collective*, 857 A.2d 893 (Conn. 2004) (reproduced in Petitioner's Appendix (hereafter "Pet. App.") at 1-27). The parties to this action had each issued insurance policies to the owners of the plant. Pet. App. at 2. The petitioner, Hartford Steam Boiler Inspection and Insurance Company ("HSB") had issued a boiler and machinery policy, and the respondents, Underwriters at Lloyd's and Companies Collective, *et al.* ("Lloyd's"), had issued an "all-risks" property insurance policy. *Id.* After the loss, HSB contended that the cause of the loss was an explosion of gas or unconsumed fuel, a peril excluded from its coverage and covered under Lloyd's policy. *Id.* at 40. Lloyd's contended that the loss was the "breakdown of a fired vessel" excluded from the coverage provided by the "all-risks" policy, and that the event did not involve a combustion explosion that might otherwise render it a covered loss. *Id.*

The policies contained parallel "Loss Adjustment Endorsements" which provided that, in the event of a coverage dispute between the boiler and machinery carrier and the "all-risks" carrier, each would pay half of the amount in dispute and submit the matter to a panel of three arbitrators. Accordingly, HSB paid the insured $10,933,435.86 and Lloyd's paid the insured $11,880,525.33, and they each submitted their dispute as to allocation of coverage to a panel of three arbitrators. *Id.* at 2, 41.

The parties agreed to a "Joint Statement of Issues" to be decided by the Arbitrators. In January 1997, the Arbitrators issued an Interim Award on the factual questions set forth in the Statement of Issues. *Id.* at 3, 41-42. However, the parties believed that certain questions remained unanswered, so, at their request, the Arbitrators issued a "Supplemental and Clarified Decision to the Answer of Issue iv of the January 9, 1997 Decision of Arbitrators." *Id.*

While the Interim Award and Supplemental Decision clarified the application of policy language to the incident, they failed to specifically allocate repair and restoration costs between the policies. *Id.* Accordingly, the parties reopened the arbitration, returning to the Arbitrators again for further clarification. *Id.* at 3-4, 42. For the purposes of this resubmission, termed "Phase II Arbitration Re: Allocation Issues," the parties stipulated to a "Statement of Issues and Procedural Time Line for Entergy Arbitration." *Id.* The parties further agreed to "Revised Procedures to Govern Phase II Arbitration Re: Allocation Issues." *Id.*

On June 28, 2001, after six years of work and the two previous Arbitrators' decisions, the parties and the Arbitrators reconvened for the Phase II hearing. *Id.* at 4, 42. At the close of evidence on the final day of the hearing, the Arbitrators consulted with the parties regarding the form of the award to be rendered. At the conclusion of the parties' closing statements, Frank Ockerby, the arbitration panel umpire (apparently concerned with clarifying the Arbitrators' duties in properly adjudicating the matter), inquired of HSB's counsel what form the Arbitration Award should take. Counsel for HSB replied: "The end point from the Panel is a statement that someone pays someone and how much they pay." *Id.* at 5 n.4. The Arbitrators thereafter concluded the hearings.

On October 24, 2001, the panel requested more time within which to render its decision. The parties consented to the Arbitrators' request though no new deadline was established for the issuance of a decision. The parties also consented to the Arbitrators' request to retain the services of an accounting firm. *Id.* at 37-38.

On January 24, 2002, the Arbitrators rendered an award ("Award"). *Id.* at 4, 43. The Award specifically incorporated the issues to be determined as outlined by the parties in the scope of arbitration and, based on "cause of loss and policy conditions," assigned specific dollar amount attributable to each such issue. *Id.* Thereafter, HSB moved to vacate the Award on the ground that the Arbitrators had not complied with section 4(d) of the submission which indicated that the award should "contain facts and conclusions regarding the insurance policies . . . as necessary to support the award." *Id.* at 4. Lloyd's moved that the Award be confirmed or, in the alternative, referred back to the Arbitrators for clarification. *Id.*

Specifically, Lloyd's argued that the Award did, in fact, conform to the submission, thereby compelling confirmation of the same. Further, Lloyd's contended that HSB waived any right to receive findings of fact by representing on the record that it sought only "a statement that someone pays someone and how much they pay." *Id.* at 32-33. Alternatively, Lloyd's requested that the award be remanded to the panel. *Id.* at 37.

After briefing and oral argument, the superior court (Rittenband, J.) issued an order remanding the award. The

court compared the award to the submission and concluded that the Panel's

> findings are not sufficiently specific or comprehensive to comply with the requirement that all liability and allocation issues and coverage issues be resolved, nor do the findings contain sufficient findings of fact and conclusions regarding the interpretation of the insurance policies that are the subject of this arbitration as necessary to support the award.

Id. at 37. The court, however, noted its reluctance to vacate the award; instead opting to refer the award back to the Arbitrators for clarification

> because [vacating the award] would mean starting over again, and the parties would lose all the work, effort, etc. that covered six years of [the] arbitration. In the interest of economy of the parties, the Panel and judicial economy, it would appear that a remand to the arbitrators would be more practical and a better remedy than vacating the awards.

Id. The superior court ordered the award to be returned to "the Arbitration Panel for a rehearing and/or a clarification of its awards so that it complies with the requirements of the submissions and so that there be a sufficient finding of facts and interpretations of the policies so as to fully comply with the submissions." *Id.* at 38-39. Finally, the court held that HSB's representations on the record regarding the final form of the arbitration did not constitute waiver of its contractual right to receive these findings of facts. *Id.* at 33.

HSB thereafter appealed,[1] challenging the propriety of the order to remand the award where the thirty day time period for the Arbitrators' decision had expired. *Id.* at 5. Lloyd's cross-appealed seeking confirmation of the award on the ground that HSB had waived any objection to its form. *Id.* at 5 n.4. Additionally, Lloyd's argued that the superior court's order was not immediately appealable. *Id.* at 6. In October 2004, the Connecticut Supreme Court issued its decision, dismissing HSB's appeal on the ground that it was not taken from a final judgment.

The Supreme Court held that the judgment of the trial court directing rehearing by the arbitration panel to clarify its award constituted neither a final judgment nor an appealable interlocutory order. *Id.* at 1. Under Connecticut law, an appeal can be taken only from an order "confirming, vacating, modifying or correcting an award." Conn. Gen. Stat. § 52-423. Holding that the superior court's remand order was none of these, the Supreme Court held that it was without jurisdiction over HSB's appeal (and Lloyd's cross appeal). *Id.* at 27.

In so holding, the Supreme Court categorically rejected HSB's claim that the sole means by which a superior court could remand an arbitration award for a rehearing was via Connecticut General Statutes section 52-418(b),[2] which,

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1. The appeal was later transferred to the Connecticut Supreme Court on its own order. Pet. App. at 5.

2. Connecticut General Statutes section 52-418(b) provides:

> If an award is vacated and the time within which the award is required to be rendered has not expired, the
>
> (Cont'd)

HSB argued, was inapplicable because the thirty-day window for remand had closed. *Id.* at 5. The Supreme Court held that: first, section 52-418(b) was not implicated in this case because the superior court had not vacated the arbitration award, only remanded it; and, second, that the doctrine of *functus officio* provided sufficient authority for the remand. *Id.* at 11-21. Because the superior court acted within its power to remand the award for clarification, and the award had not yet been vacated, confirmed, or modified, the Supreme Court dismissed the appeal and cross appeal. *Id.* at 27.

REASONS FOR DENYING THE PETITION

I. HSB HAS NOT RAISED A FEDERAL QUESTION THAT INVOKES THE JURISDICTION OF THIS COURT

HSB's petition hinges on one critical and wrongly asserted premise: that the Connecticut Supreme Court has re-written, in an *ad hoc* manner, the provisions of the Federal Arbitration Act ("FAA") to permit the remand of a dispute to an arbitration panel, pursuant to 9 U.S.C. § 10(b),[3] even

(Cont'd)

> court or judge may direct a rehearing by the arbitrators. Notwithstanding the time within which the award is required to be rendered, if an award issued pursuant to a grievance taken under a collective bargaining agreement is vacated, the court or judge shall direct a rehearing unless either party affirmatively pleads and the court or judge determines that there is no issue in dispute.

3. Section 10(b) provides: "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

though the time for rendering the award has expired. *See* Petition (hereafter "Pet.") at 11-12. In HSB's view, the Connecticut Supreme Court, following the lead of several federal circuits, improperly "affirmed an order remanding the award, without vacating it, and without regard to any temporal limitation upon the arbitrators' ability to act (as set forth in the arbitration agreement)." *Id.* at 15.

In its efforts to sound the "judicial lawmaking" alarm, HSB distorts the decision of the Connecticut Supreme Court. A balanced and fair reading of the Connecticut Supreme Court's decision reveals that the court neither explicitly nor implicitly construed the provisions of 9 U.S.C. § 10, or any other federal statute, for that matter. In fact, the Connecticut Supreme Court held that the trial court did not vacate the award and, therefore, 9 U.S.C. § 10 was inapplicable to the dispute; rather, the trial court simply found the award to be incomplete and remanded it back to the panel for clarification. Pet. App. at 9-10. This remand was in accordance with the principles of *functus officio*, a common law doctrine which is independently implied in every arbitration agreement unless an agreement provides otherwise. *Id.* at 11. Therefore, because the terms of 9 U.S.C. § 10 are not even implicated here, HSB has not met its burden of establishing that the Connecticut Supreme Court has decided a federal question that triggers the jurisdiction of this Court as set forth in 28 U.S.C. § 1257(a).

A. The Connecticut Supreme Court Did Not Base Its Decision on 9 U.S.C. § 10, But Rather On The Doctrine Of *Functus Officio*

In its petition, HSB vociferously argues that the Connecticut Supreme Court has violated this Court's mandate

to interpret federal statutes in accordance with their plain meaning. In this vein, HSB maintains that the Connecticut Supreme Court has engrafted a third statutory option onto 9 U.S.C. § 10, which allows for a remand of an award to the original arbitration panel "without regard to whether the arbitrators' appointment has expired under the parties' agreement." Pet. at 3.

Yet, remarkably, HSB has overlooked the plain fact that the Connecticut Supreme Court did not ground the trial court's authority to order a remand to the panel on any of the provisions contained in 9 U.S.C. § 10. Indeed, the Supreme Court specifically held that the trial court did not vacate the arbitration award. Pet. App. at 9-10. The only substantive analysis of 9 U.S.C. § 10 in the Supreme Court's decision appears in a footnote, wherein it held that the section was not applicable to the case at hand.

Specifically, the Court opined:

> [HSB] claims that federal cases permitting the District Court to remand an award to the arbitrator are inapposite in the present matter because the cases do not "consider the temporal limitation on the court's authority to remand set out in 9 U.S.C. 10 (b). . . ." ***We note that our determination that the trial court remanded but did not vacate the award renders inapplicable any time limitation contained in § 10 (b).*** *See Hoffmann v. Cargill, Inc.*, 59 F. Supp.2d 861, 874 n.7 (N.D. Iowa 1999) (noting that 9 U.S.C. 10 [a][5], now codified at 9 U.S.C. § 10 [b] "will become pertinent here only

> if this court vacates the arbitration award in question here"), *rev'd on other grounds*, 236 F.3d 458 (8th Cir. 2001).

Pet. App. at 21, n.16 (emphasis added). Thus, until such time as the award is vacated, 9 U.S.C. § 10 is simply inapplicable.

Additionally, as HSB acknowledges, the Connecticut Supreme Court, quoting a Third Circuit decision, freely admitted that "there is no explicit provision in the [arbitration act] [permitting] such a remand." Pet. App. at 13 (quoting *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 333-34 (3d Cir. 1991)).

Nevertheless, HSB persists with its argument that the Connecticut Supreme Court and at least three other circuit courts of appeals have failed to reference section 10(b) in cases involving a remand to the original arbitrators. Pet. at 21 (citing *Office & Prof'l Employees Int'l Union, Local 471 v. Brownville Gen. Hosp.*, 186 F.3d 326 (3d Cir. 1999); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers, Local 24*, 357 F.3d 546 (6th Cir. 2004); *M & C Corp. v. Edwin Behr GMBH & Co.*, 326 F.3d 772 (6th Cir. 2003); *International Bhd. of Teamsters v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409 (9th Cir. 1997)).

Notwithstanding these assertions, HSB ignores that the Connecticut Supreme Court upheld the trial court's authority to order a remand on a source that is independent of 9 U.S.C. § 10 (b); namely, the common law doctrine of *functus officio.*

B. The *Functus Officio* Doctrine Was Invoked Separately And Apart From 9 U.S.C. § 10 In Accordance With The Parties' Private Arbitration Agreement

The *functus officio* doctrine, which has its roots in the ancient common law, derives from the Latin meaning "having performed his or her office" and has been defined as "'having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force of authority.'" Pet. App. at 11 n.9 (quoting *Sterling China*, 357 F.3d at 553); *see also* BLACK'S LAW DICTIONARY 696 (8th Ed. 2004). The law implies the doctrine in all arbitration agreements unless an agreement provides otherwise.[4] *See, e.g.*, Pet. App. at 12, n.11 ("[t]he doctrine of functus officio serves as a default rule, and it applies only in the absence of an agreement between the parties to the contrary"); *see also Hyle v. Doctor's Assocs. Inc.*, 198 F.3d 368, 370 (2d Cir. 1999); *Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991); *Colonial Penn*, 943 F.2d at 333; *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 848

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4. This proposition is consistent with *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), where this Court held that

> [a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted.

Id. at 479 (citation omitted).

(7th Cir. 1995). The policy underlying the doctrine is an "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." *Colonial Penn*, 943 F.2d at 331-32 (internal quotation marks omitted).

In the arbitration context, the doctrine of *functus officio* had been historically applied to arbitrations governed by the common law. *See, e.g., La Vale Plaza, Inc. v. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967) (applying Pennsylvania common law). Importantly, for purposes of this case, courts that applied this doctrine to common law arbitrations developed certain exceptions to this prohibitory rule. These exceptions, which have been most notably expounded by the Third Circuit in *La Vale Plaza*, 378 F.2d at 569, provide that:

> (1) an arbitrator "can correct a mistake which is apparent on the face of his award";
>
> (2) "where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination";
>
> (3) "[w]here the award, ***although seemingly complete***, leaves doubt whether the submission has been fully executed, ***an ambiguity arises which the arbitrator is entitled to clarify.***"

Id. at 573 (emphasis added).

The third exception, which the Connecticut Supreme Court applied in the case at hand, allows a court to remand an incomplete or unclear arbitration award to the original panel for the *sole* purpose of clarification. As *La Vale Plaza* made clear, "[t]he resolution of such an ambiguity is not within the policy which forbids an arbitrator to redetermine an issue which he has already decided, for there is *no opportunity for redetermination on the merits of what has already been decided.*" *Id.* (emphasis added).[5]

While the *functus officio* doctrine and its exceptions were historically applied to common law arbitrations, federal courts have also relied on the doctrine in arbitrations governed by federal arbitration statutes, including the FAA. *See, e.g.*, Pet. App. at 11, n.10; *Ottley v. Schwartzberg*, 819 F.2d 373, 375-77 (2d Cir. 1987); *Office & Prof'l Employees*, 186 F.3d at 331-32; *Colonial Penn*, 943 F.2d at 331; *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000); *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir. 1968); *Lanier v. Old Republic Ins. Co.*, 936 F. Supp. 839, 845 n.11 (M.D. Ala. 1996) (citing cases).

In its petition, HSB has attacked the Connecticut Supreme Court's decision (and the federal precedent on which it relies) by asserting that these cases simply have engrafted a non-statutory remedy onto 9 U.S.C. § 10(b). In so arguing, HSB overlooks two critical points. First, the Connecticut Supreme Court explicitly held that section 10(b) was *not* implicated in this case because the award was not vacated. Pet. App. at 9-10; *see also Galt*, 397 F.2d at 442. Second, and most importantly, the Connecticut Supreme

5. The Connecticut Supreme Court specified that the substance of the award could not be revisited, only the missing information could be supplied. Pet. App. at 20-21.

Court did not need to "engraft" the *functus officio* doctrine onto section 10(b); application of the doctrine is a contractual matter because it is implied in *every* arbitration agreement unless provided otherwise. *See, e.g.*, Pet. App. at 12, n.11; *Hyle*, 198 F.3d at 370; *Trade & Transport, Inc.*, 931 F.2d at 195; *Colonial Penn*, 943 F.2d at 333; *Glass, Molders, Pottery, Plastics & Allied Workers*, 56 F.3d at 848.[6]

As a result, in accordance with this Court's long-standing mandate that private parties may set the rules of their arbitrations, the Connecticut Supreme Court properly enforced the independent authority granted to it vis-à-vis the parties' private arbitration agreement. Pet. App. at 4; *see also Volt*, 489 U.S. at 478 ("[the FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

Accordingly, in the case at the hand, the Connecticut Supreme Court, relying on federal precedent, concluded that

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6. Indeed, HSB appears to agree with this proposition as it noted in its petition that:

> It is an equally elementary principle of law that the parties' contract terms are deemed to incorporate existing principles of law: "it is presumed that parties contract with knowledge of, or in reliance on, existing law; accordingly it is presumed that the parties had such law in contemplation when the contract was made." 17A C.J.S. *Contracts* § 348 (1999); *accord* 11 Samuel Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS § 30.19, at 351-52 (4th ed. 1999); 17A AM. JUR. 2D *Contracts* § 371 (2004).

Pet. at 22. Thus, HSB should have been aware that the *functus officio* doctrine was a part of the parties' agreement in this case.

the trial court had the power to remand an incomplete arbitration award back to the panel for purposes of "[clarifying] the factual basis for [the panel's] allocation of the sums representing each party's liability . . . [as] there is no question pertaining to [HSB's] and the underwriters' respective liability and the sums to be paid under the award. . . ." Pet. App. at 21. The Court explained its reasoning for allowing such a remand by noting:

> Because the "third exception to the functus officio doctrine . . . permit[s] the arbitrator to complete an assigned task"; *Green v. Ameritech Corp.*, [200 F.3d 967, 977 (6th Cir. 2000)]; *we believe that this exception, as well as federal precedent permitting a court to direct a clarifying remand,* enabled the trial court to order a rehearing for clarification purposes without vacating the award.

Pet. App. at 21 (emphasis added).

In relying on federal precedent and the parties' private agreement, the Connecticut Supreme Court did not decide a federal question worthy of this Court's review. Pursuant to 28 U.S.C. § 1257(a), which HSB asserts as its jurisdictional basis, this Court may review the Connecticut Supreme Court's decision *only* "where the validity of a . . . *statute of the United States is drawn in question.* . . ." 28 U.S.C. § 1257 (a) (emphasis added). The Connecticut Supreme Court neither interpreted nor purported to apply 9 U.S.C. § 10 to the case at hand. Rather, the court's foray into federal matters was merely tangential through its reference to federal precedent, which only provided the necessary guidance for the application of the *functus officio* doctrine to the private arbitration agreement entered into by the parties. As a result,

the authority to remand the award for clarification arose from the arbitration agreement itself, separate and apart from 9 U.S.C. § 10, thus not implicating this Court's federal question jurisdiction. The petition should be denied.

II. CONTRARY TO HSB'S ASSERTIONS, THERE IS NO INTER-CIRCUIT CONFLICT

In an effort to make its petition appear attractive, HSB boldly asserts that the Connecticut Supreme Court's decision "conflicts with a decision of the United States Court of Appeals for the Ninth Circuit, and reflects general disarray in the decisions of the federal courts of appeals and federal district courts law." Pet. at 18. In actuality, however, HSB's purported "conflict" is nothing more than smoke and mirrors. The Ninth Circuit and countless other federal courts have all ruled in a manner consistent with the decision of the Connecticut Supreme Court. Simply stated, there is no conflict for this Court to resolve.

A. The Ninth Circuit's Holding in *Western Employers* Is Not Applicable

HSB's "conflict" argument rests exclusively on one Ninth Circuit case, *Western Employers Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258 (9th Cir. 1992). In *Western Employers*, the parties, who were involved in an investment relationship, executed a "Limited Trading Authorization," which included a standard agreement to arbitrate any disputes under the rules of the National Association of Securities Dealers (NASD). *Id.* at 259. Additionally, upon Western's request, the parties agreed to alter the standard agreement so as to require the arbitrators to make certain findings of fact and conclusions of law. *Id.*

Throughout the subsequent arbitration proceedings, Western's counsel reminded the arbitrators about the parties' agreement, which required the panel to make such findings. In response, "[t]he Chairmen of the panel responded that the panel *was not bound* by an agreement between [the parties]." *Id.* at 260 (emphasis added.) Additionally, the panel also indicated that it agreed with a representation made by defense counsel that the NASD rules may not have permitted the parties to enter into a contract that would be binding on the arbitrators. *Id.* Therefore, the panel expressly refused to make such findings of fact and law. *Id.*

In light of the panel's express refusal to make such findings, which clearly contravened the parties' agreement, the Ninth Circuit vacated the panel's award, concluding that "the NASD panel clearly failed to arbitrate the dispute according to the terms of the arbitration agreement. In so doing, the panel exceeded its authority under 9 U.S.C. § 10(d) [currently § 10(a)(4)]." *Id.* at 262. Notably, the Ninth Circuit never mentioned the doctrine of *functus officio* or its exceptions, but rather vacated the award in accordance with the express terms of 9 U.S.C. § 10(a)(4). The omission of any discussion relating to the *functus officio* doctrine may be easily explained, however, as it appears that the parties did not argue that the doctrine was relevant, perhaps because there was simply nothing for the panel to clarify.

HSB maintains that *Western Employers* is indistinguishable from this case and, therefore, is controlling. Curiously, however, HSB has omitted any substantive discussion in its petition of another Ninth Circuit case, *International Bhd. of Teamsters v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409 (9th Cir. 1997), which was decided five

years *after Western Employers*.[7] Indeed, this omission is particularly surprising given the Connecticut Supreme Court's express reliance on *International Brotherhood* in its decision. Pet. App. at 18-21 & n.15.

In *International Brotherhood*, a union and an employer participated in arbitration proceedings related to a grievance filed after the employer terminated one of the union's members. 109 F.3d at 1410. The arbitrator determined that the employee had been terminated without just cause and thereby reinstated the employee. *Id.* Subsequently, a dispute arose over whether the arbitration award entitled the employee to receive back pay. Over the defendant's objection, the union requested that the arbitrator clarify her award. In response, she acknowledged, "[M]y award was not clear in regard to the reinstatement for [the grievant]. . . . In my award, I intended for [the grievant] to receive back pay. . . ." *Id.*

On appeal, the employer claimed that the arbitrator lacked authority to clarify her award pursuant to the doctrine of *functus officio*. The Ninth Circuit disagreed, noting that it had previously adopted the three exceptions articulated in *La Vale Plaza*, 378 F.2d at 573, which allowed "an arbitrator [the opportunity to] correct a mistake which is apparent on

7. Although citing to *International Brotherhood* in two string cites in its petition, Pet. at 15, 21, HSB never acknowledges that it is a Ninth Circuit decision applying the *functus officio* doctrine, instead creating an impression that *Western Employers* represents the totality of Ninth Circuit law on the issue. Rather than confronting *International Brotherhood* head-on, HSB attempts to hide it, in one place even prefacing a string cite by saying that cases "principally from the Third and Sixth Circuits" have applied the *functus officio* doctrine – and then listing three cases each from the Third and Sixth Circuits – but tucked neatly between them is a cite to the Ninth Circuit's decision in *International Brotherhood*.

the face of his award, *complete an arbitration if the award is not complete*, and clarify an ambiguity in the award." *Id.* at 1411 (emphasis added). Importantly, the Ninth Circuit did not mention its holding in *Western Employers* or indicate in any way that it was relevant to the matter at hand. Accordingly, the Ninth Circuit concluded that "the arbitrator's clarification was permissible because it completed the award." *Id.*

In reaching its decision, the Ninth Circuit emphasized that the arbitrator's state of mind as to why back pay was not awarded was relevant to the proceedings. Specifically, the court noted that the arbitrator had indicated that she intended to make such an award, but failed to do so, and that the employer had "offered *no* evidence to refute the arbitrator's explanation of her state of mind at the time she executed the initial award." *Id.* (emphasis added).[8] Here, the Connecticut Supreme Court concluded that the arbitrators' states of mind were similarly relevant, pointing out that HSB had not presented any "evidence of wilfulness on behalf of the arbitration panel to ignore or otherwise subvert the terms of [the] arbitration agreement."[9] Pet. App. at 20-21 n.15 (relying on *International Brotherhood*).

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8. In its petition to this court, HSB argues for the *first time* that the arbitrators' states of mind are irrelevant, noting that "nothing in the text of the FAA conditions the remedy for a defective award on whether the defect was the result of intentional misconduct or inadvertent mistake." Pet. at 19-20. HSB has overlooked, however, that both the Ninth Circuit and the Connecticut Supreme Court remanded matters for clarification not on the express provisions of the FAA, but on the doctrine of *functus officio*, which was part of the parties' private agreements.

9. Indeed, Lloyd's claims that HSB waived the contractual provision requiring findings of fact and conclusions of law as a result

(Cont'd)

Therefore, contrary to HSB's assertions, the law in the Ninth Circuit, as articulated in *International Brotherhood*, is that absent a showing of an arbitrator's *express* refusal to make such findings, a remand for clarification is appropriate. As a result, any purported "intra-circuit" conflict that may have arguably existed prior to *International Brotherhood* has since been resolved in a manner that is completely consistent with the Connecticut Supreme Court's decision in this case.

B. Other Federal Courts That Have Addressed This Question Have Arrived At The Same Conclusion As The Connecticut Supreme Court

Alternatively, HSB's "broader" argument is that there is "general disarray" in the federal courts regarding the practice of remanding arbitration awards to the original panel for clarification. While acknowledging that a number of courts have agreed with the Connecticut Supreme Court's decision, HSB suggests that these cases were wrongly decided and that only a small number of cases have been "faithful" to the dictates of 9 U.S.C. § 10(b). Pet. at 20. For the latter proposition, HSB cites two cases, both of which are easily distinguishable.

Remarkably, the first case HSB cites is *entirely consistent* with the Connecticut Supreme Court's decision. *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439 (7th Cir. 1968). In *Galt*, a contractor and subcontractor embroiled in a commercial dispute submitted the dispute to arbitration

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(Cont'd)

of statements made during the arbitration. *See supra.* Perhaps as a result of HSB's comments, the Arbitrators thought they were no longer being asked to supply findings of facts; this claim is the subject of Lloyd's cross-appeal, which has yet to be resolved. Pet. App. at 27.

pursuant to the terms of the subcontract. After an initial award was made, the subcontractor filed a motion to confirm the award. *Id.* at 441. In response, the contractor filed a motion seeking remand to the original arbitrators in order to determine whether they considered a "payment clause" contained in the subcontract, which the contractor had asserted as a defense, but was not addressed by the panel. *Id.* Concluding that "it was uncertain whether the arbitrators had considered whether the payment clause was subject to arbitration," the district court remanded the matter to the original panel. *Id.* at 441-42.

On appeal, the Seventh Circuit affirmed the district court's decision, expressly concluding (as the Connecticut Supreme Court did in this case), that 9 U.S.C. § 10 did *not* apply. Specifically, the court noted:

> Section 10 of [the FAA] empowers district courts to vacate awards and direct rehearings by the arbitrators where a mutual, final, and definite award was not made if the time for rendering the award had not expired. ***Because the award did not mention the payment clause***, even though that was one of the defenses presented to the arbitrators by [the contractor], ***the award was not definite within the meaning of Section 10 (d) [currently § 10 (a) (4)] of the Act***. . . . It was entirely appropriate for the District Court to let the arbitrators explain whether they had interpreted the payment clause. This method commendably avoided any judicial guessing as to the meaning of the award. *See La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). It did not constitute a judicial invasion of the

> arbitrators' province but rather served to give the parties what they bargained for – a clear decision from the arbitrators.

Id. at 442 (emphasis added). Thus, since the award omitted any discussion of one of the contractor's defenses, it was not definite or complete within the meaning of 9 U.S.C. § 10 and, therefore, could be remanded to the panel for clarification. Similarly, in this case, the Connecticut Supreme Court also determined that 9 U.S.C. § 10 was inapplicable because the arbitration award was incomplete. Therefore, HSB's reliance on *Galt* is not only curious but completely contradicts any assertion that the federal case law is in a state of disarray.

Similarly, HSB's reliance on *Hoffman v. Cargill, Inc.*, 59 F. Supp. 2d 861 (N.D. Iowa 1999), *rev'd on other grounds*, 236 F.3d 458 (8th Cir. 2001), is misplaced. In *Hoffman*, the district court *vacated* an arbitration award based on two "extra-statutory" grounds not explicitly mentioned in 9 U.S.C. § 10: (1) the award was "completely irrational" because it was based on fundamental errors and unfounded determinations of law and fact; and (2) the proceedings in general were "fundamentally unfair." *Id.* at 895-96.[10] After vacating the award, the district court declined to direct a rehearing in accordance with 9 U.S.C. 10 (a) (5) [currently § 10(b)] because the time for making such an award had passed. *Id.* at 896.

While HSB seeks shelter within the court's holding, it has overlooked that the *Hoffman* court explicitly noted that

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10. The Eighth Circuit subsequently reversed these findings and ordered that the award be confirmed. *Hoffman*, 236 F.3d at 461-63.

the temporal limitations contained in section 10 (b) "will become pertinent here *only if this court vacates* the arbitration award in question here." *Id.* at 874 n.7 (emphasis added). As noted previously, the Connecticut Supreme Court held that section 10 (b) was inapplicable for this very reason, as the trial court did not *vacate* the arbitration award. Pet. App. at 9-10.[11] Therefore, *Hoffman* is irrelevant to the case at hand.

As a result, HSB has not provided this Court with any authority for the proposition that there is "general disarray" in the federal courts regarding the practice of remanding an arbitration award under the *functus officio* doctrine. Rather, it has been universally held by federal courts that such a remand *is* appropriate. *See, e.g., Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987); *Office & Prof'l Employees Int'l Union, Local 471 v. Brownville Gen. Hosp.*, 186 F.3d 326, 331-32 (3d Cir. 1999); *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 332-35 (3d Cir. 1991); *La Vale Plaza, Inc. v. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers, Local 24*, 357 F.3d 546, 553-55 (6th Cir. 2004); *M & C Corp. v. Edwin Behr GMBH & Co.*, 326 F.3d 772, 782-83 (6th Cir. 2003); *Green v. Ameritech Corp.*, 200 F.3d 967, 976-78 (6th Cir. 2000); *Tri-State Bus. Machs., Inc. v. Lanier Worldwide, Inc.*, 221 F.3d 1015, 1019 (7th Cir. 2000); *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 846-848 (7th Cir. 1995); *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir. 1968); *Domino Group, Inc. v. Charlie Parker Mem'l Found.*, 985 F.2d 417, 420 (8th Cir. 1993);

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11. Again, the entire basis for the Connecticut Supreme Court decision was that there was no final judgment because the award was not vacated. Pet. App. at 27.

International Bhd. of Teamsters v. Silver State Disposal Serv., Inc., 109 F.3d 1409, 1411-12 (9th Cir. 1997); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1270-71 (10th Cir. 1999); *Lanier v. Old Republic Ins. Co.*, 936 F. Supp. 839, 845-46 & n.11 (M.D. Ala. 1996). In light of this breadth of authority, it is clear that the federal courts have been remarkably unified in their resolution of this issue. There is no cause for this Court to grant the extraordinary remedy of certiorari.

III. THE REMAND OF AN INCOMPLETE ARBITRATION AWARD TO THE ORIGINAL PANEL FOR THE SOLE PURPOSE OF CLARIFICATION ADVANCES THE GOALS OF COMMERCIAL ARBITRATION

It is well established that judicial review of an arbitration award must take into consideration and weigh two competing policy goals. The first of these considerations is that the underlying goal of arbitration is to encourage the expedient and efficient resolution of commercial disputes. *Volt*, 489 U.S. at 478. Nonetheless, while arbitration is clearly favored, this Court has consistently held that "we must not . . . allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation;" namely, the "desire to enforce agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985). By remanding an incomplete arbitration award for purposes of clarification, the Connecticut Supreme Court's decision fully comported with both of these policy considerations.

In its petition, HSB has presented a "parade of horribles" based on its unsupported notion that the Connecticut Supreme Court permitted a remand without regard to the temporal

limitations contained in 9 U.S.C. § 10(b). In HSB's view, the Connecticut Supreme Court was "improperly" motivated by a desire to effectuate federal and state policies that favor arbitration as a means for the expedient resolution of commercial disputes. Pet. at 24. As explained in Part II, however, the Connecticut Supreme Court created no such provision, but instead applied an exception to the doctrine of *functus officio*, which was an implied part of the parties' arbitration agreement. *See supra.*

As a result, contrary to HSB's allegations, the Connecticut Supreme Court faithfully followed this Court's mandate to enforce the terms of privately enforced agreements. Pet. App. at 22-23. Indeed, the practice of remanding arbitration awards for clarification inherently ensures the enforcement of the parties' agreement, as "[s]uch a remand avoids the court's misinterpretation of the award and is therefore *more likely to give the parties the award for which they bargained.*" *Colonial Penn*, 943 F.2d at 334 (emphasis added); Pet. App. at 23; *see also Galt*, 397 F.2d at 442 ("[remand] did not constitute a judicial invasion of the arbitrators' province but rather served to give the parties what they bargained for – a clear decision from the arbitrators").

Despite HSB's numerous unsuccessful attempts to interject claims of judicial lawmaking, purported conflicts, and disarray in the federal courts, the fact remains that the Connecticut Supreme Court's decision is consistent not only with a plethora of federal case law that spans the circuits, but also is consistent with the parties' private agreement.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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